

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-7002

United States Court of Appeals

For the Second Circuit.

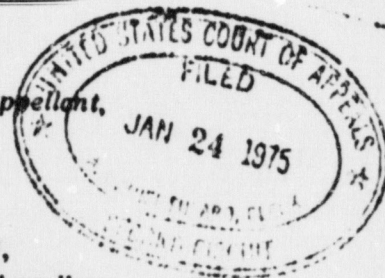
ULMONT O. CUMMING, JR.,

Plaintiff-Appellant.

-against-

SELMA ELLISON a/k/a SELMA HERSHFELD,

Defendant-Appellee.



*On Appeal from The District Court of the United States
For The Southern District of New York*

APPELLANT'S BRIEF UPON APPEAL

ULMONT O. CUMMING, JR.,

Plaintiff-Appellant, Pro Se

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INDEX

	<u>Page</u>
Issues Presented for Review.....	1
Statement of Case.....	2
Statement of Facts.....	4
Summary of the Argument.....	8
Point I - The lower court erred in holding that the complaint failed to state a cause of action for the recovery of the subject apartment.....	10
Point II - Cumming has a superior right to possession of the subject apart- ment and this action is an appro- priate avenue with which to seek possession.....	14
Point III - Under New York law, Cumming is entitled to immediate possession of the subject apartment.....	15
Point IV - Appellant is entitled to partial summary judgment on the limited issue of the superior right to possession of the subject apart- ment because there were no genuine issues of fact to be tried which are relevant to this limited claim.....	17
Conclusion.....	23
Exhibit A - District Court Order Dated May 1st, 1974.....	25
Exhibit B - District Court Order Dated June 26th, 1974.....	37
Exhibit C - Order of the Appellate Term, New York Supreme Court : First Judicial Department.....	43

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
ULMONT O. CUMMING, JR., :
Plaintiff-Appellant, :
--against-- :
SELMA ELLISON a/k/a SELMA HERSHFELD, :
Defendant-Appellee. :
-----x

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF UPON APPEAL

Issues Presented For Review

1. Does the complaint assert a cause of action for the recovery of the subject apartment, or for the court's protection of the plaintiff-appellant's use and occupation thereof?
2. Upon the papers submitted to the court, is the plaintiff-appellant entitled to summary judgment?

Statement of the Case

Appellant Cumming appeals from a decision of the United States District Court for the Southern District of New York, re-printed at page 52 in the appendix, denying appellant's application for summary judgment.

This is an action by ULMONT O. CUMMING, JR., ("Cumming") against SELMA ELLISON a/k/a SELMA HERSHFELD ("Ellison") for declaratory judgment, a writ of injunction and compensatory damages pursuant to Section 210(a) of the Economic Stabilization Act of 1970, as amended, to protect and redress certain legal wrongs suffered by Cumming due to certain acts and practices of Ellison arising out of said Act or any order or regulation issued pursuant thereto. Cumming also seeks punitive damages.

Previously, and as contained in the lower court's memorandum filed May 2nd, 1974, in which it denied Cumming's motion for a preliminary injunction, and the court's memorandum filed June 27th, 1974, denying Cumming's motion for partial summary judgment on the issue of liability alone, the court denied Ellison's cross-motion for judgment dismissing the complaint, expressly holding that:

(1) Section 210 of the Economic Stabilization Act of 1970, as amended, authorizes the present suit;

(2) The complaint states a cause of action upon which relief may be granted;

(3) The cause of action is not barred by the principles of election of remedies, collateral estoppel, or res judicata.

A copy of the court's memorandum filed May 2nd, 1974 is re-printed at the end of this brief as Appellant's Exhibit "A" and a copy of the court's memorandum filed June 27th, 1974 is re-printed at the end of this brief as Appellant's Exhibit "B".

The parties hereto are also bound by a determination of the Supreme Court of the State of New York, Appellate Term, First Judicial Department, to the effect that Ellison was mandated by the Economic Stabilization Act of 1970, as amended (6 C.F.R. 301.208(b) 1 and 2) to offer a renewal lease to Cumming and Ellison did not make such a tender. The Appellate Term went on to hold that absent this tender, the tenant was not wrongfully holding over and a summary proceeding commenced in the City of New York, County of New York, upon which Ellison recovered possession of the subject premises from Cumming,

should not have been maintained because the landlord could not show a clear right to possession. A copy of this decision of the Appellate Term of the Supreme Court of the State of New York, First Department, is reprinted at the end of this brief as Appellant's Exhibit "C".

The Statement of Facts

Cumming is a former tenant in a residential building owned and operated by Ellison in the City of New York. The apartment in question was subject to the provisions of the Economic Stabilization Act of 1970, as amended.

Cumming resided in the apartment in question from approximately November 1st, 1958 through July 6th, 1973. During that period of time, the lease covering the apartment had been renewed numerous times, the final lease running from November 1st, 1969 until October 31st, 1971, at a monthly rental of \$150.00. During October of 1971, Ellison notified Cumming that the monthly rental would be increased \$25.00. Cumming objected to this proposed increase on the grounds that it violated the "Presidential Freeze on Rents" (See Executive Order No. 11, 615, 3 C.F.R. Section 199 (1971 Comp.)). Immediately thereafter, Cumming filed a complaint with the Internal

Revenue Service. Pursuant to said complaint, the Internal Revenue Service investigated the matter and found that the \$25.00 per month increase in rent effected on November 1st, 1971 was a violation of the Economic Stabilization Program (App. 26).

On November 1st, 1971, Cumming paid the November rent in the sum of \$175.00 as demanded by Ellison. On November 11th, 1971, Ellison told Cumming that she was shocked that he had complained to the Internal Revenue Service about the increase in rent. On November 28th, 1971, Ellison served Cumming with a "30-day notice" terminating the tenancy. On December 1st, 1971, Cumming paid the December rent in the sum of \$175.00 as demanded by Ellison. Ellison refused to accept Cumming's tender of \$150.00 for each of the first five months of 1972. Cumming's checks were returned to him with letters from Mrs. Ellison's attorneys informing him that his lease was terminated. On June 14th, 1972, Ellison commenced a summary proceeding in the Civil Court of the City of New York seeking to have Cumming evicted as a hold-over tenant.

At the hearing on Ellison's petition, Cumming interposed a defense of retaliatory eviction based upon the Economic Stabilization Act and the regulations issued pursuant thereto (6 C.F.R. Section 301 et seq.). In particular, Cumming relied on 6 C.F.R. Section 301.502(f) (1971) (Now 6 C.F.R. Section 301.303 (1972)) which expressly prohibits eviction in retaliation for a tenant's exercise of his rights under 6 C.F.R. Sections 301 et seq. Following the hearing, Judge Burton Sherman of the Civil Court found that Cumming had failed to sustain the defense of retaliatory eviction and awarded possession of the apartment to Ellison. Cumming filed a notice of appeal to the Appellate Term of the Supreme Court of the State of New York, First Department, and Judge Sherman's order was stayed pending appeal.

Due to delays caused by Cumming's financial inability to obtain appellate counsel, as well as the failure of Ellison's attorneys to cooperate in the processing of the appeal or to certify the record upon appeal, the appeal was not heard until more than ten months following Judge Sherman's order. The Appellate Term granted Cumming certain stays, but

subsequently refused to extend the stay of Judge Sherman's order. The last day expired on July 2nd, 1973. On July 6th, 1973, Cumming was evicted from the apartment by a New York City Marshal. Thereafter, Cumming perfected his appeal and the decision of the Civil Court was reversed on November 13th, 1973.

The Appellate Term interpreted the Economic Stabilization Act and the regulations issued thereunder, holding that under the Act, Ellison was mandated to offer Cumming a renewal lease, and absent this tender, Cumming was not wrong in holding over. It appears that the Appellate Term did not consider whether or not Cumming's defense of retaliatory eviction was supported by the evidence before the Civil Court. The Appellate Term directed a final judgment in favor of Cumming, dismissing the petition. Following the reversal of the Civil Court, Cumming moved for an order of restitution pursuant to New York CPLR, Section 5523 (McKinney's, 1970). The Appellate Term denied the motion without opinion, but granted him leave to renew it in the Civil Court. In the Civil Court, Cumming sought the return of his apartment. Judge Sherman granted this motion to the extent of

ordering Ellison to pay Cumming the amount of the storage charges for his personal property. There are no other matters pending in the New York courts regarding this transaction.

Summary of the Argument

Briefly stated, Cumming contends that he has a superior right to possession of the subject apartment predicated upon the mandate of the Economic Stabilization Act of 1970, as amended, which directed Ellison to offer him a renewal lease (6 C.F.R. 301.208 (b) 1 and 2) and because he was evicted pursuant to the judgment of the Civil Court subsequently reversed by the Appellate Term.

Predicated upon the mandate of the Act, Cumming should have received a renewal lease for the subject apartment. Instead, he received a "30-day notice" which commenced a formidable barrage of legal papers upon him, terminating, as far as his possession of the apartment is concerned, with his eviction on July 6th, 1973, pursuant to a judgment of the Civil Court, subsequently reversed by the Appellate Term.

Under New York Law (New York R.P.A.P.L., Section 713), Cumming was entitled to commence a summary proceeding in the Civil Court of the City of New York for the return of his apartment and the trial that proceeded would be immediate (New York R.P.A.P.L., Section 745). By this motion, Cumming invoked the jurisdiction of the District Court, pursuant to Section 210 of the Act, and sought a summary determination of his right to possession of the apartment in question.

POINT I

THE LOWER COURT ERRED IN HOLDING THAT
THE COMPLAINT FAILED TO STATE A CAUSE
OF ACTION FOR THE RECOVERY OF THE SUB-
JECT APARTMENT.

The complaint itself appears in the joint appendix at page one. A fair reading of the complaint reveals that Cumming states every law upon which he relies seeking redress and every fact necessary to support his cause of action. Cumming discusses his illegal eviction and his assertion that he should have physical possession of the subject apartment as well as compensatory and punitive damages. The complaint should, and does, stand on its own.

While it is asserted that the complaint is clear and lucid in every respect and that it seeks the protection that Cumming deserved for tenancy in the subject apartment, assuming arguendo, if there were any defects in the complaint, that defect should be interpreted so as to do substantial justice.

All pleadings must be construed as to do substantial justice (Plunkett v. Abraham Bros. Packing Co., 129 F.2d. 419; Dayton Bread Co. v. Montana Flour Mills Co., 126 F.2d. 257; Peoples Natural Gas Co. v. Federal Power Commission, 75 App. D. C. 235 127 F. 2d. 153).

It is so provided by Rule 8(f) (Conley v. Gibson, 355 U.S. 41, 2 L. Ed. 2d. 80, 78 S.Ct. 99; Fitzpatrick v. Commonwealth Oil Co., 285 F.2d. 726), and, furthermore, Rule 1 provides that the rules themselves shall be construed to secure the just, speedy and inexpensive determination of every action. Pleadings must be construed, not only with Rules 1 and 8(f), but also with Rule 8(e)(1) providing that technical forms of pleading are not required, in the background. It has been said that all refinements of pleadings are subordinated to the one aim of achieving substantial justice, and the Courts are urgently charged to interpret pleadings in that spirit (Metzger v. Breeze Corporations, Inc., 37 F. Supp. 693).

The charge of Rule 8(f) that pleadings must be construed to do substantial justice in general, and its specific implications are not stated. But the implications and amplifications of the Rule in particular instances are currently being developed by case law.

Pleadings are to be construed liberally (Burnbaum v. Trussel, 347 F.2d. 86; Franklin Life Ins. Co. v. Bieniek, 312 F.2d. 365; Sidebotham v. Robison, 216 F.2d. 816) in favor of their validity where such construction does substantial justice (DeLoach v. Crowley's, Inc., 128

F.2d. 378). Such liberal construction is contemplated by the Rules of Civil Procedure, particularly Rule 8(f) providing that substantial justice shall be the object of construction of pleading, and Rule 8(e)(1) providing that technical forms of pleading shall not be required.

Pleadings are construed in favor of the pleader, and construction in this regard, while liberal, is directed to the doing of substantial justice (Metropolitan Life Ins. Co. v. Fugate, 313 F.2d.788; Truth Seeker Co. v. Durning, 147 F.2d. 54; Clyde v. Brokerick, 144 F.2d, 348; Cool v. International Shoe Co., 142 F.2d., 318). Such construction is in accord with Rule 8(f).

Where the scope and tenor of a pleading is doubtful and open to construction, that reasonable meaning which will support it should be adopted, rather than one which will defeat it (Dayton Bread Co. v. Montana Flour Mills, Op.Cit.; Sewerage Commission of Milwaukee v. Activated Sludge, Inc., 69 F.2d., 594; Reconstruction Finance Corp. v. J. G. Menihan Corp. 22 F. Supp. 180).

A pleading asserting a claim is construed liberally to the end of upholding the pleading as showing such claim and a right to relief thereon (L'Oringe v. Medical Protective Co., 394 F.2d. 57; Sidebotham v. Robeson Op.Cit.; Machado v. McGrath, 90 App. D.C. 70, 193 F.2d. 706). All doubts and ambiguities must be

resolved in favor of the claim (Clyde v. Brokerick Op.Cit.). The pleader has been held entitled to every reasonable intendment (Garbutt v. Blanding Mines Co., 141 F.2d. 679; D.L. Stern Agency, Inc. v. Mutual Benefit Health & Accident Assn., 43 F. Supp. 167); the Rules of Civil Procedure so require (Perry v. Creech Coal Co., 55 F. Supp. 998).

There can be no doubt, that under any construction, with or without a construction aimed at doing justice or a construction liberally interpreted in favor of the pleader, the complaint sets forth a cause of action for the peaceful quiet enjoyment of the subject apartment, as well as a cause of action for money damages, both compensatory and punitive.

POINT II

CUMMING HAS A SUPERIOR RIGHT TO POSSESSION OF THE SUBJECT APARTMENT AND THIS ACTION IS AN APPROPRIATE AVENUE WITH WHICH TO SEEK POSSESSION.

Pursuant to the Economic Stabilization Act of 1970, 6 C.F.R. 301.208(b) 1 and 2, Ellison was mandated to offer Cumming a renewal lease. She did not do so. Section 210(a) of the Economic Stabilization Act awards that:

"Any person suffering legal wrong because of any act or practice arising out of (the Act) or any order or regulations issued pursuant thereto, (to) bring an action in a District Court of the United States without regard to the amount in controversy for appropriate relief..."

The Trial Court has already ruled that it has jurisdiction to entertain this action pursuant to Section 210(a) (See Memorandum of District Court commencing at page 25 infra).

POINT III

UNDER NEW YORK LAW, CUMMING IS ENTITLED
TO IMMEDIATE POSSESSION OF THE SUBJECT
APARTMENT.

The New York Real Property Actions and Proceedings Law provides for summary proceedings for the recovery of real property, and Section 713 thereof permits a special proceeding to be maintained after a ten-day notice to quit has been served upon the respondent upon various grounds including any superior right to possession.

Should Mr. Cumming have decided to fragment this litigation, he could have commenced a summary proceeding pursuant to New York R.P.A.P.L. Section 713 and by establishing his clear right to possession at an immediate trial (within ten days pursuant to New York R.P.A.P.L. Section 745).

It is unmistakably clear that under a special proceeding commenced in a New York court, Cumming would have had possession of the subject apartment quite some time ago. The issues concerning possession of the subject apartment are not in dispute and the landlord is not authorized under New York Law to compel the tenant to accept any substitute for possession.

Without the consent of the tenant, there is no monetary sum sufficient to obviate the landlord's obligation to give the tenant possession of the demised premises.

All the elements of a valid cause of action for possession under New York Law have been set forth in the complaint in this action and are totally undisputed by the appellee as set forth in the Rule 9(g) statement annexed to and made a part of the moving papers.

POINT IV

APPELLANT IS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON THE LIMITED ISSUE OF THE SUPERIOR RIGHT TO POSSESSION OF THE SUBJECT APARTMENT BECAUSE THERE WERE NO GENUINE ISSUES OF FACT TO BE TRIED WHICH ARE RELEVANT TO THIS LIMITED CLAIM.

Pursuant to Local Rule 9(g), Cumming has appended to his motion papers a statement of facts upon which this limited claim of possession for the subject apartment is predicated and upon which Cumming respectfully asserts there is no genuine issue to be tried. In other words, any issues concerning retaliatory motives of the appellee's health are not pertinent to the limited claim which is the subject matter of the motion in the lower court, to wit: That the appellant has a superior right to possession of the subject apartment. All assertions contained in the 9(g) statement are of facts previously determined by the lower Court in its prior decisions in this case and, therefore, have become the law of the case. Such determinations have not been appealed, nor have they been vacated or set aside.

The gravamen of Cumming's motion in the lower Court for possession of the subject apartment was predicated upon the fact that he resided in the apartment from approximately November 1st, 1958 to July 6th, 1973; that the lease covering the subject apartment had been renewed numerous times, the final lease running from November 1st, 1969 to October 31st, 1971, at a monthly rental of \$150.00; that during the month of October 1971, Ellison notified Cumming that the monthly rental would be increased by \$25.00; that Cumming objected to the proposed increase on the grounds that it violated Executive Order No. 11, 615, 3 C.F.R., Section 199; that immediately thereafter Cumming filed a complaint with the Internal Revenue Service; that the Internal Revenue Service investigation resulted in the finding that the \$25.00 increase in monthly rent effected on November 1st, 1971, was in violation of the Economic Stabilization Program; that Ellison was required by law to offer Cumming a renewal lease pursuant to the provisions of the Economic Stabilization Act of 1970, as amended, and the determination as to this fact subsequently made by the Supreme Court of the State

of New York, Appellate Term, First Judicial Department; that Ellison did not in fact offer Cumming a renewal lease; that on the contrary Ellison caused the eviction of Cumming on the ground that Cumming's lease had expired and that he was holding over beyond its term; that the judgment pursuant to which Cumming was evicted has been unanimously reversed by the Supreme Court of the State of New York, Appellate Term, First Judicial Department; that the Economic Stabilization Act of 1970, as amended, permits a Federal suit to compel compliance; and that the District Court has subject matter jurisdiction predicated upon a complaint that states a cause of action and that the cause of action stated in the complaint is not barred on the theory of election of remedies or res judicata.

All of these facts, each and every one of them, having either been admitted by Ellison, determined in a prior Court action, or previously determined in a prior motion in the Court below, as to this limited claim, and specifically as to these limited facts, present no genuine issues of fact to be tried and we respectfully asserted in the lower Court that there were no genuine issues at all.

The law of summary judgment in the Federal Courts is not unlike the law of summary judgment in the New York State Courts. On a motion for summary judgment, the plaintiff is called upon to submit facts, as is the defendant, to show that there is a prima facie case for a defense thereto. Merely pleading denials is and has been held to be insufficient from the date when summary judgment has been put into the rules of Civil Practice.

In Dwan v. Masserne, 199 A.D. 872, the Appellate Division of the Supreme Court of the State of New York, in its earliest decision involving Summary Judgment, said:

"The power is given to the court, but it is needless to say that it must be exercised with care, and not extended beyond its just limits. The Court is not authorized to try the issue, but is to determine whether there is an issue to be tried. If there is, it must be tried by a jury. Plaintiff's affidavit must state such facts as are necessary to establish a good cause of action. It will not be sufficient if it verifies only a portion of the cause of action, leaving out some essential part thereof. It must state the amount claimed, and its belief that there is not defense to the action. The defendant must show that he has a bona fide defense to the action, one which he is able to estab-

lish. It must be a plausible ground of defense, something fairly arguable, and of a substantial character. This he must do by affidavits or other proof. He cannot shelter himself beyond general or specific denials or denials of knowledge or information sufficient to form a belief. He must show that his denial or his defense is not false or sham, but interposed in good faith and not for delay. If he shall show such facts as may be deemed by the Judge hearing the motion sufficient to entitle him to defend, this Court will not review the order, as we consider that no substantial right of the plaintiff has been violated."

Again in Dodwell & Co. v. Silverman, 234 A.D.

362, the same Court said:

"This motion called upon the defendant to assemble and reveal his proofs in order to show that the matter set up in his answer was real and was capable of being established upon trial. Inasmuch as the dealings between the defendant Dennis-Freres were entirely by letters and cables, plaintiff produced all such writings bearing upon the transaction. It was then the duty of the defendant to set forth any further correspondence, if such there were, in support of the averments of the answer. This he has totally failed to do. Mere general averments will not suffice.

The moving papers show conclusively that there is no merit in defendant's claim that any of the merchandise was sold by sample, or was not of the quality contracted for, or that it was not shipped pursuant to contract. The alleged loss of weight of the cassia is shown to be usual and due to evaporation. The correspondence and undenied interviews had by plaintiff's representative with the defendant demonstrate that the real reason why these drafts were not met and these defenses asserted was the decline in the market price and also the defendant's inability to meet them at maturity."

Accordingly, all the issues which Miss Ellison has attempted to raise during the course of this litigation, inclusive of her personal health problems and purported lack of retaliatory motive, are irrelevant to the appellant's application in the lower court for summary judgment on the issue of the right to possession of the apartment alone, and therefore, in the absence of a triable issue of fact, summary judgment should have been granted to the plaintiff for the relief requested.

CONCLUSION

The decision of the District Court is wrong in every respect. A fair reading of the complaint does not support the finding that the complaint fails to state a cause of action concerning the appellant's clear right to possession of the subject apartment. Nor does the evidence support any finding that there is any real or genuine defense to that portion of the appellant's cause of action seeking possession of the subject apartment. These findings are based upon pure conjecture, without any support in the record. Finally, the court erred in denying summary judgment to the appellant. A finding that the complaint does not set forth a cause of action for possession of the subject apartment cannot be based upon the relevant case law establishing that the complaint should be liberally construed in favor of the pleader. Predicated upon a proper interpretation of the complaint, and without any issues of fact to be tried, the appellant's motion for summary judgment should have been granted.

The decision below should be reversed, with instructions to enter a judgment in favor of the appellant giving him possession of the subject apartment.

Dated: New York, New York

January 20, 1975

Respectfully submitted,

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EXHIBIT A - DISTRICT COURT ORDER DATED MAY 1st, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ULMONT O. CUMMING, JR., : 74 Civ. 84 (CHT)
Plaintiff, :
--against-- : MEMORANDUM
SELMA ELLISON, :
Defendant. :
-----x

TENNEY, J.

Plaintiff, Ulmont O. Cumming, Jr., commenced this action against Selma Ellison, seeking damages and injunctive relief, based on an alleged violation of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. Section 1904 Note. Cumming is a former tenant in a residential building owned and operated by Ellison in the City of New York. The gravamen of Cumming's complaint is that Ellison caused him to be evicted from his apartment in retaliation for his filing a complaint with the Internal Revenue Service ("I.R.S.") following an attempt by Ellison to raise the monthly rental in violation of the Economic Stabilization Act. Cumming seeks the return of his apartment and

EXHIBIT A - DISTRICT COURT ORDER DATED MAY 1st, 1974

damages.^{1/} He now moves for a preliminary injunction compelling Ellison to return possession of the apartment to him pending the outcome of this action. For the reasons set out below, the motion is denied.

Cumming resided in the apartment in question from approximately November 1, 1958 until July 6, 1973. During that period of time the lease covering the apartment had been renewed numerous times, the final lease running from November 1, 1969 until October 31, 1971 at a monthly rental of \$150.00. During October of 1971, Ellison notified Cumming that the monthly rental would be increased \$25.00. Cumming objected to this proposed increase on the grounds that it violated the "Presidential Freeze on Rents". Exec. Order No. 11,615, 3 C.F.R. Section 199 (1971 Comp.). Immediately thereafter, Cumming filed a complaint with the I.R.S. The I.R.S. did act upon the complaint, but neither party has informed the Court as to the form or the outcome of this action.

On November 11, 1971, Ellison told Cumming that she was shocked that he had gone to the I.R.S. At the end of that month, she served him with a "Thirty Day Notice" terminating the tenancy. Cumming had paid

EXHIBIT A - DISTRICT COURT ORDER DATED MAY 1st, 1974

the November rent in the amount of \$175.00, and while it is not known if any rent was paid for December, Ellison refused to accept Cumming's tender of \$150.00 for each of the first five months of 1972. Cumming's checks were returned to him with a letter from Mrs. Ellison's attorneys informing him that his lease had been terminated. On June 14, 1972, Ellison commenced a summary proceeding in the Civil Court of the City of New York seeking to have Cumming evicted as a hold-over tenant.

At the hearing on Ellison's petition, Cumming interposed a defense of retaliatory eviction based on the Economic Stabilization Act and the regulations issued thereunder. 6 C.F.R. Section 301 et seq. In particular, Cumming relied on 6 C.F.R. Section 301.502(f) (1971 [now 6 C.F.R. Section 301.303 (1972)] which expressly prohibits evictions in retaliation for a tenant's exercise of his rights under 6 C.F.R. Section 301 et seq. Following the hearing, Judge Burton Sherman, of the Civil Court, found that Cumming had failed to sustain the defense of a retaliatory eviction and awarded possession of the apartment to Ellison. Cumming filed a notice of appeal to the Appellate Term of the Supreme Court of the State of New York, First

EXHIBIT A - DISTRICT COURT ORDER DATED MAY 1st, 1974

Department, and Judge Sherman's order was stayed pending the appeal.

For some unknown reason, it took Cumming over ten months to perfect his appeal. The Appellate Term granted him one extension on June 11, 1973, but refused to further continue the stay of Judge Sherman's order. The stay expired on July 2, 1973. On July 6, Cumming was evicted from the apartment by a New York City Marshal. Cumming did finally perfect his appeal, and the decision of the Civil Court was reversed on November 13, 1973.

It appears that the Appellate Term did not consider whether Cumming's defense of retaliatory eviction was supported by the evidence before the Civil Court. The Appellate Term instead relied on its interpretation of the Economic Stabilization Act and the regulations issued thereunder and ruled that under the Act, Ellison was mandated to offer Cumming a renewal lease, and absent this tender, Cumming was not wrongfully holding over. The Appellate Term directed a final judgment in favor of Cumming dismissing the petition.

EXHIBIT A - DISTRICT COURT ORDER DATED MAY 1st, 1974

Following the reversal of the Civil Court, Cumming moved for an order of restitution pursuant to N.Y. C.P.L.R. Section 5523 (McKinney's, 1970). The Appellate Term denied the motion without opinion, but granted him leave to renew it in the Civil Court. In the Civil Court, Cumming sought the return of the apartment and money which had become due for the storage of his personal property. Judge Sherman granted this motion to the extent of ordering Ellison to pay Cumming the amount of storage charges. There are no other matters pending in the New York courts regarding this transaction.^{2/}

A preliminary injunction is an extraordinary remedy. It is often stated that the purpose of such relief is to preserve the status quo pending the final determination of a controversy and it should only be granted where the plaintiff demonstrates "a strong likelihood of ultimate success on the merits and irreparable injury unless such relief is granted, or where the applicant makes a limited showing of probable success but raises substantial issues requiring further inquiry and shows that the harm to him outweighs the injury to others if the relief is denied." Crimmins v. American Stock Exchange, 346 F. Supp. 1256, 1258

EXHIBIT A - DISTRICT COURT ORDER DATED MAY 1st, 1974

(S.D.N.Y. 1972); accord, Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197 (2d Cir. 1970).

As to the merits, Cumming relies most heavily on the fact that Ellison was, at first, willing to renew the lease at the higher rental, but refused to do so shortly after he registered his complaint with the I.R.S. Cumming further asserts that when he asked Ellison the reason for the "Thirty Day Notice", she refused to answer. These facts, if established, might support a claim for retaliatory eviction. In her answering papers, Ellison seeks to rebut this prima facie showing by demonstrating that there were other factors which led to the eviction.

It has been said that the landlord-tenant relationship has replaced marriage insofar as giving rise to acrimonious disputes. If this be so, the present case is no exception. In attempting to demonstrate the legality of the eviction, Ellison has directed the Court's attention to a history of clashes between herself and Cumming. Ellison suffers from severe arthritis and had, on numerous occasions, requested that Cumming exchange apartments with her so that she would not have to climb as many stairs. Cumming

EXHIBIT A - DISTRICT COURT ORDER DATED MAY 1st, 1974

refused to do so on the grounds that there were other apartments available to her on his floor and on the floors below. It seems, however, that Ellison was required to take sitz baths and the only other apartment which she might have occupied did not have a bathtub. Ellison maintains that Cumming treated her in an abusive manner and that she was afraid of him. She states that he has cussed at her for no reason, slammed doors in her face, and refused to give her access to his apartment to make necessary repairs. Cumming, on the other hand, states that Ellison never exhibited any fear of him and was, in fact, in the habit of using her passkey to enter his apartment unannounced. At one time, according to Cumming, she came upon him while he was in the shower. The next day he received a letter from her inquiring as to the identity of the naked man she had found in his apartment.^{3/}

In view of the rather strained relationship that appears to have existed between Ellison and Cumming, it cannot be said that Cumming has shown a strong likelihood of success on the merits. He has made a limited showing of probably success, but there are substantial issues requiring further inquiry.

EXHIBIT A - DISTRICT COURT ORDER DATED MAY 1st, 1974

Since the injury to Ellison, if the relief were granted, outweighs the harm to him, if the relief were denied, his application for a preliminary injunction must be denied.

In his moving papers, Cumming states that he is suffering irreparable injury as a result of not being able to live in his former apartment. There is no allegation that he has not been able to find a substitute residence, and while this Court realizes that Cumming is greatly discomposed over his eviction from his former residence, it must also consider the situation of Ellison.

Ellison, a woman in her mid-seventies, is now living in the apartment formerly occupied by Mr. Cumming. She has recently undergone a double mastectomy as a result of breast cancer and is presently under the care of a physician. It would constitute a hazard to her health if she were forced to vacate the apartment at this time. All of the other apartments in her building are presently subject to a lease and she would have to look elsewhere for a place to live. Under these circumstances, the risk to Ellison's health clearly outweighs the discomfiture of Cumming.

EXHIBIT A - DISTRICT COURT ORDER DATED MAY 1st, 1974

Accordingly, plaintiff's motion for a preliminary injunction is denied.

So ordered.

Dated: New York, New York

May 1, 1974

/s/ Charles H. Tenney
U.S.D.J.

EXHIBIT A - DISTRICT COURT ORDER DATED MAY 1st, 1974

ULMONT O. CUMMING, JR.,
Plaintiff,
-against-
SELMA ELLISON,
Defendant.

74 Civ. 84 (CHT)

FOOTNOTES

1/ This action presents a novel question. While there have been a number of prior actions arising out of retaliatory evictions, these actions have, for the most part, been commenced by the government under either section 208 or 209 of the Act and have sought damages rather than the return of the apartments in question. See, e.g., United States v. Matson, CCH Economic Controls Paragraph 9909 (25) (D. Or. 1973); United States v. K.S.V. Blackmor, Inc., CCH Economic Controls paragraph 9998(39) (D. N.M. 72). Nevertheless, section 210 reads as follows:

"Section 210. Suits for damages or other relief

"(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

"(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

EXHIBIT A - DISTRICT COURT ORDER DATED MAY 1st, 1974

"(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

"(2) not less than \$100 or more than \$1,000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: Provided, That where the overcharge is not willful within the meaning of Section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge within ninety days from the date of the presentation of such claim.

"(c) For the purposes of this section, the term 'overcharge' means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title."

- 2/ The order of the Civil Court is considered a final judgment and appealable under New York law. Pittsfield Nat'l Bank v. Bayne, 140 N.Y. 321, 35 N.E. 630 (1893). Nevertheless, Cumming's action in this Court is not barred by the principles of res judicata or collateral estoppel. Judge Sherman's decision on the merits has been reversed on appeal. His finding as to the defense of retaliatory eviction is therefore not binding on this Court. The judgment of the Appellate Term was on a different cause of action from that presented here, and as there is no evidence that the Appellate Term ever concerned

EXHIBIT A - DISTRICT COURT ORDER DATED MAY 1st, 1974

itself with the merits of the retaliatory eviction defense, Cumming is not collaterally estopped from litigating that issue here. Cf., Restatement of Judgments, comment (b) to Sub. 1 of Section 69 at 316 (1942).

- 3/ This situation culminated in the filing of a complaint by Cumming against Ellison for criminal trespass. The complaint was dismissed following a preliminary hearing in the Criminal Court of the City of New York.

EXHIBIT B - DISTRICT COURT ORDER DATED JUNE 26th, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ULMONT O. CUMMING, JR., :
Plaintiff, : 74 Civ. 84 (CHT)
--against-- :
SELMA ELLISON a/k/a SELMA HERSHFELD, : MEMORANDUM
Defendant. :
-----x

TENNEY, J.

Plaintiff has brought this action for declaratory, injunctive and monetary relief under Section 210 of the Economic Stabilization Act of 1970, as amended (Public Law No. 92-210, 85 Stat. 743) ("the Act"), claiming that defendant, his former landlady, evicted him from his apartment in retaliation for his having filed a complaint with the Internal Revenue Service in which it was alleged that defendant had attempted to raise plaintiff's rent in violation of the Act. Plaintiff's previous motion for a preliminary injunction compelling defendant to return possession of his former apartment to him was denied in

EXHIBIT B - DISTRICT COURT ORDER DATED JUNE 26th, 1974

a memorandum decision of this Court filed May 1, 1974. While that motion was pending, plaintiff moved, pursuant to Fed. R. Civ. P. 56(c), for an order of summary judgment, interlocutory in character, on the issue of liability alone. Defendant then cross-moved for an order dismissing the complaint for lack of subject matter jurisdiction, and for failure to state a cause of action.^{1/} For the reasons stated infra, both plaintiff's motion for summary judgment in its favor and defendant's motion dismissing the complaint are denied in their entirety.

As was stated in the previous decision denying plaintiff's motion for a preliminary injunction, Cumming v. Ellison, 7 Civ. 84 (S.D.N.Y., May 1, 1974) (unreported) at 1 n.1, the Court has determined that it has subject matter jurisdiction of this action under Section 210(a) of the Act. That section permits:

"Any person suffering legal wrong because of any act or practice arising out of (the Act), or any order or regulations issued pursuant thereto, (to) bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief..."

EXHIBIT B - DISTRICT COURT ORDER DATED JUNE 26th, 1974

Plaintiff's complaint alleges that defendant raised his rent in excess of that permitted under the regulations promulgated under the Act, 6 C.F.R. Section 301 et seq., that plaintiff reported the rent overcharge to the Internal Revenue Service, and that defendant thereafter commenced eviction proceedings. Clearly the complaint states a claim under Section 210(a) of the Act and is cognizable in this Court. See Price Comm'n Ruling 1972-206, 37 F.R. 13648 (July 12, 1972).

Turning to the merits, the Court has examined the papers submitted by both parties on these motions, as well as the papers submitted on plaintiff's earlier motion, and finds that there remains a genuine issue as to a material fact: to wit, whether defendant's dominant motive in bringing a summary proceeding for eviction against plaintiff in the New York courts was to retaliate for plaintiff's having filed the complaint with the Internal Revenue Service. Although the facts presented in plaintiff's papers might support a claim for retaliatory eviction, defendant has likewise presented affidavits which tend to support a contrary conclusion: to wit, that the eviction proceed-

EXHIBIT B - DISTRICT COURT ORDER DATED JUNE 26th, 1974

ing was commenced so that defendant might obtain plaintiff's apartment for herself or so that defendant might be rid of a tenant who, according to the affidavits, was a bothersome and otherwise disagreeable tenant. The facts set forth in this Court's earlier decision, Cumming v. Ellison, 74 Civ. 84 at 1-6, show the existence of this issue of material fact quite clearly and the papers submitted on the instant motions merely re-emphasize the existence of that factual issue.

The elements of retaliation, crucial to plaintiff's claim, is really a question of motive or intent. Where, as here, the facts presented in the affidavits of both sides might equally tend to support or negate the existence of that intent, the Court has the obligation under Fed. R. Civ. P. 56(c) to deny summary judgment and leave the determination of defendant's motive or intent to the trier of fact, which is charged with the responsibility of weighing the credibility of the opposing parties and their respective witnesses.

EXHIBIT B - DISTRICT COURT ORDER DATED JUNE 26th, 1974

Accordingly, both plaintiff's and defendant's motions are denied.

So ordered.

Dated: New York, New York

June 26, 1974

/s/ Charles H. Tenney
U.S.D.J.

EXHIBIT B - DISTRICT COURT ORDER DATED JUNE 26th, 1974

ULMONT O. CUMMING, JR.,
Plaintiff,

74 Civ. 84 (CHT)

-against-

SELMA ELLISON a/k/a SELMA HERSHFELD,
Defendant.

FOOTNOTE

1/ Actually, defendant asked that the complaint be dismissed because "plaintiff has elected to pursue his remedies in the New York State courts which has (sic) jurisdiction of the cause of action herein...". The Court is treating this argument as one to dismiss the complaint for failure to state a claim. Defendant has failed to comply with Rule 9(b) of the General Rules for the Southern District of New York by having failed to submit a "memorandum setting forth the points and authorities relied upon". Defendant's failure to comply with this rule "may be deemed sufficient cause for the denial of the motion". In any event, it would appear that the "election of remedies" defense is inapplicable to this case. "The election rule is that by asserting a choice of inconsistent claims for relief in a judicial proceeding, a litigant is precluded, in subsequent litigation, from advancing inconsistent claims." 1B Moore's Federal Practice paragraph 0.405(7) at 761 (2d Ed. 1965). Since plaintiff is essentially asking for the same relief that he asked for in the state proceeding for restitution, he is not seeking a remedy inconsistent with the remedy he sought in the state action. Moreover, as explained in the previous decision of this Court, Cumming v. Ellison, 74 Civ. 84 at 4 n.2, it does not appear that this action is barred by the doctrines of res judicata or collateral estoppel. It need only be added that plaintiff's application for restitution, made pursuant to N.Y. C.P.L.R. Section 5523, was not based upon his claim of retaliatory eviction. He was merely asking the New York State courts to exercise their discretionary authority to reinstate the property and rights which he had lost prior to reversal of the judgment awarded in favor of defendant in the New York State Supreme Court.

EXHIBIT C - ORDER OF THE APPELLATE TERM NEW YORK
SUPREME COURT : FIRST JUDICIAL DEPARTMENT

365. ELLISON. pet-res. v. CUMMING, JR.,
res-ap - The landlord was mandated by the
Economic Stabilization Act of 1970, as amended
(6 C.F.R. 301.208(b) 1 & 2) to offer a renewal
lease to the tenant. Absent this tender the
tenant was not wrongfully holding over and the
summary proceeding could not be maintained as the
landlord could not show a right to possession
(Bensamon v. Bedrosian 123 Misc. 146). The
tenant by remaining in possession did not tender
an option to the landlord to put him out as a
trespasser (Stern v. Equitable Trust Co., 238
N.Y. 267).

The burden of proving a holdover was on the
landlord (Myers v. Beakes Dairy Co., 132 App.
Div. 710) and she failed to sustain the burden.

Final judgment unanimously reversed with \$30
costs and final judgment directed in favor of
tenant dismissing the petition with costs.

STATE OF NEW YORK)
CITY OF NEW YORK : ss.:
COUNTY OF NEW YORK)

Maria B. Wolff

Shirley M. [illegible]

HERMAN A. STUHL
Notary Public, State of New York
No. 31-9230450
Qualified in New York County
Commission Expires March 30, 1976